



**Department of
Transportation**

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

OFFICE OF CIVIL RIGHTS
DECEMBER 2019

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I. GENERAL REQUIREMENTS - 49 CFR Part 26: SUBPART A

A. Objectives- Section 26.1

The New York State Department of Transportation (NYSDOT) is committed to a Civil Rights Program that promotes participation of Disadvantaged Business Enterprises in NYSDOT's contracting opportunities, in accordance with federal law and regulations.

This part seeks to achieve several objectives:

(a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the NYSDOT's highway, transit, and airport financial assistance programs;

(b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;

(c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;

(d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;

(e) To help remove barriers to the participation of DBEs in USDOT-assisted contracts;

(f) To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.

(g) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and

(h) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

B. Applicability- Section 26.3

NYSDOT is a recipient of financial assistance from the U. S. Department of Transportation (USDOT) including Federal highway funds, Federal transit funds and Federal aviation funds. This DBE Program does not apply to any contract in which there is no USDOT financial assistance. Sub-recipients receive USDOT funding assistance administered through NYSDOT. Sub-recipients must also fully comply with NYSDOT's DBE Program.

C. Definitions - Section 26.5

For the purposes of this document the following terms are defined and described:

Affiliation As defined by the Small Business Administration (SBA) regulations, 13 CFR part 121.

- (1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:
 - (i) One concern controls or has the power to control the other; or
 - (ii) A third party or parties controls or has the power to control both; or
 - (iii) An identity of interest between or among parties exists such that affiliation may be found.
- (2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Administering Agency – Agency which receives funds directly or indirectly from an USDOT agency to progress a transportation related project or purchase. The Administering Agency may be referred to as the local public agency, agency, local government, municipality, owner, or Sponsor.

Assets The property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. Assets includes, but are not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Business, business concern or business enterprise - An entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

Compliance The process of ensuring that a recipient has correctly implemented the requirements of this part.

Compliance Specialist The individual responsible for assuring that contractors, subcontractors, consultants, public and private not-for-profit organizations, and minority, women and disadvantaged businesses doing business with the Department of Transportation and its sub-recipients comply with Federal and State Equal Opportunity statutes, rules, regulations, policies, and Executive Orders governing businesses receiving public funds for goods and services.

Contingent Liability A liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

Contract A legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. A lease is considered to be a contract.

Contractor One who participates, through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit, or airport program.

Corrective Action An action taken by NYSDOT or a subrecipient to ensure that a policy, procedure, program or service is in conformance with federal or state regulations.

Days Calendar days. In computing any period of time, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where NYSDOT or a sub-recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

United States Department of Transportation or (USDOT) The Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Design -Bid- Build A project delivery method in which the agency or owner contracts with a separate entity for the design and construction of a project.

Design- Build A project delivery method to deliver a project in which the design and construction services are contracted by a single entity known as the design-builder. In contrast to "[design-bid-build](#)", design-build relies on a single point of responsibility and is used to minimize risks for the project owner and to reduce the delivery schedule by overlapping the design phase and construction phase of a project.

Direct Recipient A recipient which receives USDOT financial assistance and may provide funding to sub-recipients..

Disadvantaged Business Enterprise(DBE) A for-profit small business concern that is 1) at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Disparity Study A study used to measure degree to which minorities and women are excluded from state contracting opportunities.

USDOT-assisted contract A contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Emergency Stand By Contracts Term contracts for repair and maintenance work that must be completed within an expedited time period.

Engineering Bulletin (EB) An official NYSDOT issuance used as a transmittal document for the announcement of procedural, statutory, regulatory, or other changes.

Engineering Instructions (EI) An official NYSDOT issuance used as a transmittal document for providing instruction and guidance on how to implement procedural, statutory, regulatory, or other changes.

Equity Analysis *An analysis conducted to determine where transit services are most needed.*

Goal *An effort to award DBEs a specified dollar percentage of state contracts.*

Goal Assessment – The process of analyzing the project scope, geographic location, DBE availability, and other factors to determine an appropriate goal for a project

Good Faith Efforts Efforts undertaken by prime contractors/sub-recipients to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Home State The State in which a DBE firm or applicant for DBE certification maintains its principal place of business.

Immediate family member A father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

Indian Tribe Any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.

Job Order Contracting (JOC) A contracting method that allows organizations to get numerous, commonly encountered construction projects done quickly and easily

through multi-year contracts.

Joint Venture An association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Liabilities Financial or pecuniary obligations, including, but not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Local Projects Manual (LPM) NYSDOT manual to provide guidance for locally administered Federal and State project Sponsors to administer projects that meet Federal and State requirements required as part of receiving funding for their projects. Procedures for Locally Administered. FHWA funded Federal Aid Programs

Manual of Administrative Procedures (MAP) Are the documents which NYSDOT uses to issue policy, procedural guidance and instructions to the Main Office and eleven Regions.

Metropolitan Planning Organization (MPO) – A metropolitan planning organization is a federally mandated and federally funded transportation policy-making organization that is made up of representatives from local government and governmental transportation authorities. They ensure regional cooperation in transportation planning for any urbanized area (UZA) with a population greater than 50,000.

Minority and Women Owned Business Enterprise (MWBE) –

As defined by Article 15-A of the Executive Law, a M/WBE is a business enterprise in which at least fifty-one percent (51%) is owned, operated and controlled by citizens or permanent resident aliens who are women or minorities.

Non-Architectural and Engineering (Non-A&E) Professional service contracts other than Architectural and Engineering.

Noncompliance is when a recipient or sub-recipient has not correctly implemented the requirements of Title 49 Part 26 of the Code of Federal Regulations.

NYCDDC New York City Department of Design and Construction. It is New York City's primary capital construction project manager,

NYCDOT – New York City Department of Transportation.

NYMTC- New York Metropolitan Transportation Council which is the New York Metropolitan Planning Organization.

Office of Integrated Modal Services This Office includes Local Programs, Aviation and Freight and Passenger Rail Bureaus.

Office of Modal Grants Administration This Office includes the Public Transportation Bureau and Modal Grants.

Operating Administration or OA Refers to any of the following USDOT entities: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The “Administrator” of an operating administration includes his or her designees.

Personal net worth - Net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse. An individual's personal net worth does not include:

- The individual's ownership interest in an applicant or participating DBE firm; or
- The individual's equity in his or her primary place of residence.

Primary Industry Classification is the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: <http://www.census.gov/eos/www/naics/>.

Principal place of business is the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

Program any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient is any entity, public or private, to which NYSDOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Regional Compliance Specialist (RCS)— This individual will be located in one of the

Department's regional offices and will be responsible for assuring that contractors, subcontractors, consultants, public and private not-for-profit organizations, and minority, women and disadvantaged businesses doing business with the Department of Transportation and its sub-recipients comply with Federal and State Equal Opportunity statutes, rules, regulations, policies, and Executive Orders governing businesses receiving public funds for goods and services.

Regional Local Projects Liaison (RLPL)– The Regional Office contact for Sponsors advancing federal and/or State aid transportation projects. The RLPL ensures that local projects receive adequate supervision and inspection such that they comply with all federal laws, rules and regulations. The duties and responsibilities of an RLPL are detailed in various chapters in the Local Projects Manual (LPM).

Secretary the Secretary of Transportation or his/her designee.

Set-aside a contracting practice restricting eligibility for the competitive award of a contract solely to small business.

Small Business Administration or SBA the United States Small Business Administration.

SBA certified firm Firms with a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

Small Business A business that does not exceed the cap on average annual gross receipts specified in §26.65(b).

Socially and economically disadvantaged individual An individual who is a citizen (or lawfully admitted permanent resident) of the United States who was subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

1. Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
2. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - a. "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - b. "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

- c. "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
 - d. "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - e. "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - f. Women;
 - g. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
3. Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

Spouse A married person, including a person in a domestic partnership or a civil union recognized under State law.

Sub-Recipient An entity/agency which receives funding directly from the State or a designated recipient of federal funds for an eligible capital or operating activity pursuant to Title 23 or 49 USC. The Agency may be State, county, city, town, village or other public agency, public authority or nonprofit organization authorized and designated under agreement with NYSDOT for planning, design, construction, reconstruction, replacement, rehabilitation and preservation, including the acquisition of right of way (ROW), or the administration of operating assistance grants, for eligible federal aid transportation projects.

Training Special Provision Targeted workforce training requirement provisions contained in NYSDOT contracts over certain dollar thresholds.

Transit vehicle manufacturer (TVM) A manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for para-transit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale "off the lot" are not considered transit vehicle manufacturers.

Tribally-owned concern Any concern at least 51 percent owned by an Indian tribe as defined in this section.

Unified Certification Program Directory – Publicly available comprehensive Disadvantaged Business Enterprise (DBE) Directory as required by Title 49 Part 26.81 of the Code of Federal Regulations.

D. Record Keeping and Reporting Requirements- Section 26.11

Reporting to USDOT: 26.11(a)(b)

NYSDOT will report DBE participation in accordance with instructions and guidance received from the USDOT operating administrations.

- For the Federal Highway Administration (FHWA), NYSDOT will report DBE participation on a semi-annual basis using the Uniform Report of DBE Commitments/Awards and Payments form in the FHWA Civil Rights Connect application.
- For the Federal Transit Administration (FTA), NYSDOT will report DBE participation on a semi-annual basis using the Uniform Report of DBE Awards or Commitments and Payment form in the (FTA) Transit Award Management System (TrAMS) system.

Bidders List: 26.11(c)(1)

NYSDOT maintains a [Successful Bidders List](#) on its website. The purpose of the list is to provide information about the universe of DBE and non-DBE contractors who have successfully secured work on USDOT-assisted construction contracts let by NYSDOT. NYSDOT's Contract Management Bureau maintains this list by firm name.

Vendor Responsibility 26.11 (c)(2)

New York State law requires that public works contracts be awarded to responsible bidders. NYSDOT does not require firms to pre-qualify prior to their submission of bids. Low bidders must "post-qualify" and a completed New York State Vendor Responsibility Questionnaire For-Profit Construction (CCA-2) form must be approved by NYSDOT prior to the award of a contract or approval to subcontract. CCA-2s are not required to be submitted with a bid; though some bidders voluntarily choose to submit them on an annual basis.

NYSDOT requires all prime contractors and subcontractors that work on NYSDOT construction contracts to submit form [CCA-2, New York State Vendor Responsibility Questionnaire](#). The CCA-2 collects all required data including:

- (1) firm name;
- (2) firm address;
- (3) firm's status as a DBE or non-DBE;
- (4) age of the firm; and
- (5) the annual gross receipts of the firm.

The Contract Management Bureau maintains this information in the AASHTOWare Preconstruction database. (Currently do not enter DBE or non-DBE status into the database.)

All bidder's names, Fed ID, address and bid amounts are either entered manually from the bid documents or electronically submitted thru BidX and downloaded to Preconstruction during bid openings. For locally administered Federal and State Aid projects the CAA-2 is verified during the bidder responsibility review and is submitted to NYSDOT for approval as part of the Contract Award package (per Chapter 14 of the LPM).

Record Keeping 26.11 3(d) and (e)

Recipients must maintain records documenting a firm's compliance with the requirements of this part. At a minimum, a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews must be kept. Records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

NYSDOT, on behalf of the State UCP, must report to USDOT's Office of Civil Rights, by January 1, 2015, and each year thereafter, the percentage and location of certified DBE firms in the UCP Directory controlled by the following:

- (1) Women;
- (2) Socially and economically disadvantaged individuals (other than women); and
- (3) Individuals who are women and are otherwise socially and economically disadvantaged individuals.

E. Recipient, Sub-recipient and Contractor Assurances -Section 26.13

The following assurances shall be included in each financial-assistance agreement NYSDOT signs with a USDOT operating administration and shall be modified as appropriate and included in NYSDOT's financial-assistance agreements with sub-recipients.

Assurance: 26.13(a)

NYSDOT shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT-assisted contracts. NYSDOT's DBE Program, as required by 49 CFR Part 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and

failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to NYSDOT of its failure to carry out its approved program, the USDOT may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

Contract Assurance: 26.13(b)

NYSDOT requires that the following clause is incorporated in every USDOT-assisted contract and subcontract.

“The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;*
- (2) Assessing sanctions;*
- (3) Liquidated damages; and/or*
- (4) Disqualifying the contractor from future bidding as non-responsible.”*

Sub-recipients are similarly required to ensure that each USDOT-assisted contract that is signed with a contractor (and each subcontract the prime contractor signs with a subcontractor) includes the above assurance.

II. ADMINISTRATIVE REQUIREMENTS - 49 CFR Part 26: SUBPART B

A. DBE Program Plan and Updates - Section 26.21

This DBE Program Plan is applicable to NYSDOT as a primary recipient of funding from the following USDOT entities:

- FHWA
- FTA funds (in excess of \$250,000), and
- FAA funds (for airport planning or development that will be awarded as prime contracts which exceed \$250,000 in a Federal fiscal year).

This Plan will be applicable to NYSDOT as a direct recipient and to all NYSDOT sub recipients.

NYSDOT will provide to USDOT updates to our DBE program which represent significant changes in the program.

B. DBE Liaison Officer (DBELO)- Section 26.25

The Director of NYSDOT's Office of Civil Rights (OCR) designated as NYSDOT's DBE Liaison Officer (DBELO). The Director has enterprise-wide responsibility for developing, implementing and monitoring NYSDOT's external Civil Rights programs including the DBE program. The Director may be contacted at the following address:

Director of Civil Rights
Sondra A. Little
New York State Department of Transportation
50 Wolf Road
Albany, New York 12232
(518) 457-1129

In the capacity of the DBELO, the Director of the Office of Civil Rights is responsible for implementing all aspects of the DBE program including managing, monitoring and ensuring that NYSDOT complies with the provisions of 49 CFR Part 26. Due to NYSDOT's size and organizational structure, not all individuals and entities with DBE program-related duties and responsibilities report directly to the DBELO. Nonetheless, it is understood that the DBELO does have responsibility for the whole DBE program in NYSDOT.

The Director of OCR has direct, independent access to the Commissioner regarding Civil Rights matters including DBE program activities. The Director is NYSDOT's point

of contact for all external inquiries and communications concerning the DBE program. An organization chart is found in **Attachment 1** to this program document.

The Director of OCR administers NYSDOT's DBE program, in coordination with other appropriate agency officials. Main Office and Regional program areas provide data, input and report programmatic issues to OCR. For example, the Director holds monthly conference calls with NYSDOT's Regional Compliance Specialists, and annual Civil Rights coordination meetings. Additional Civil Rights monitoring and training is achieved primarily through OCR's periodic webinars, video conferences, consultant services, reporting and on-site visits. Overall oversight responsibilities include the following:

- Gather and report regional statistical data and other information as required by USDOT.
- Review third party contracts and purchase requisitions for compliance with this program.
- Work with all NYSDOT divisions to set overall annual goals at three-year intervals.
- Ensure that bid notices and requests for proposals are available to DBEs in a timely manner.
- Identify contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitor results.
- Analyze NYSDOT's progress toward goal attainment and identifies ways to improve progress.
- Participate in pre-bid meetings.
- Advise the Commissioner on DBE matters and achievements.
- Evaluate contractor compliance with good faith efforts.
- Provide DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
- Plan and participate in DBE training seminars.
- Certify DBEs according to criteria set by USDOT.
- Act as liaison to the New York State Uniform Certification Program (NYSUCP) partners.
- Update the NYSUCP DBE Directory regarding NYSDOT-certified DBEs.
- Provide outreach to DBEs and community organizations to advise them of opportunities.

As outlined further below, the administration of NYSDOT's DBE program is accomplished through collaboration and cooperation of various program areas. In order to ensure consistency across the program, the DBELO is part of the review and approval process for all policies, procedures and guidance issued regarding the administration of the DBE program. This information can be accessed via the [NYSDOT Business Center](#) on the NYSDOT's website. Major policies, procedures and manuals that implement the DBE program include:

- [Standard Specifications](#)
- [Construction Administration Manual \(CAM\)](#)
- [Consultant Instructions](#)
- [Highway Design Manual](#)

- Local Projects Manual (LPM)
- Project Development Manual
- Engineering Instructions, Bulletins and Directives

C. Role of NYSDOT Program Areas in DBE Program Implementation

ENGINEERING DIVISION

Office of Construction

The [Office of Construction](#) (Construction) oversees the review of all construction related activities on NYSDOT- administered, FHWA-funded capital construction contracts. The civil rights Compliance Specialist located in the Office of Construction is responsible for evaluating contractors' DBE utilizations (commitments) and review of Good Faith Efforts (GFE) made by the low bidder to achieve DBE contract goals.

The Civil Rights Compliance Specialists located within the Regional Construction Groups are responsible for monitoring all post-contract award civil rights activities and enforcing contractor compliance with the DBE program. Post-award monitoring activities include continued evaluation of GFE, pre-construction compliance meetings, tracking contractor progress towards goal attainment, conducting commercially useful function reviews, conducting contractor compliance reviews, and monitoring prompt payment to all DBEs and subcontractors.

Section 100 of NYSDOT's Contract Administration Manual defines responsibilities and provides guidance to field personnel regarding proper administration of Civil Rights Compliance Review Procedures. Construction uses NYSDOT's civil rights reporting system, which collects DBE goal, commitments, attainments and payment data from both prime and subcontractors including DBEs. This system is used by the Office of Civil Rights for report compilation and monitoring purposes.

Office of Design

The Office of Design (Design) in coordination with the Office of Civil Rights, and the Office of Construction assess contract-level DBE goals on NYSDOT-let capital construction contracts. The goal assessment process begins in the Office of Design and is described in Chapter 21 of the Highway Design Manual.

<https://www.dot.ny.gov/divisions/engineering/design/dqab/hdm/chapter-21>

The Design Quality Assurance Bureau manages the assembly of these contracts and is expected to ensure DBE goals are set on contracts, as appropriate. The DBE goals are stated in the contract advertisements and in the contract documents.

POLICY AND PLANNING DIVISION

Office of Policy, Planning & Performance

Statewide Planning Bureau

The Statewide Planning Bureau has overall responsibility for the coordinated and balanced statewide transportation planning process as mandated by Federal transportation law. This is carried out in collaboration with the State's 14 Metropolitan Planning Organizations (MPOs). An MPO is designated by the Governor for every urban area with at least 50,000 residents. MPOs provide a forum for cooperative transportation decision making and a means for the individual members to act as a body in integrating and coordinating their transportation actions. Federally-funded transportation projects in these metropolitan areas cannot be advanced unless they emerge from the MPO planning process and are approved by the MPO membership. The MPO analyzes solutions and evaluates regional transportation issues, which involves addressing other important considerations such as land use, air quality, energy, economic development and commerce.

The Staff of individual MPO's are responsible for monitoring and enforcing the contractor's compliance with the DBE program to ensure the contractors meet their DBE goals. Statewide Planning Bureau provides oversight and support to MPOs including guidance, coordination and dissemination on Department policy, state and federal regulations including DBE program requirements. FHWA and FTA require NYSDOT to submit biannual federal DBE reports. Toward that end, MPO's submit DBE reports to the Statewide Planning Bureau on a biannual basis.

Office of Integrated Modal Services

Local Programs Bureau

NYSDOT's Local Programs Bureau is responsible for developing policies and procedures for local public agencies (sub-recipients/sponsors) to use in progressing federally funded locally administered transportation projects. The Local Projects Manual (LPM) <https://www.dot.ny.gov/divisions/operating/opdm/local-programs-bureau/locally-administered-federal-aid-projects> assists non-NYSDOT transportation project Sponsors in New York State who seek Federal funding through FHWA. The LPM provides an overview of the processes, procedures, documentation, authorizations, approvals, and certifications required throughout the scoping, design, construction, and maintenance of these facilities. NYSDOT's sub-recipients/Sponsors are responsible for monitoring and enforcing contractor compliance with the DBE program including ensuring that contractors attain their DBE goal commitments, as well as monitoring DBE activities and the prompt payment requirements for all DBEs. The LPM used for the local program leverages existing guidance in place for the State-let

program to ensure consistency in meeting DBE program requirements. RLPLs monitor compliance for these projects.

Aviation Bureau

The Aviation Bureau, in collaboration with Office of Civil Rights, propose a triennial DBE goal for NYSDOT's Republic Airport. The Aviation Bureau works with Republic Airport to implement FAA-funded projects at Republic Airport. As a direct recipient of federal funds, NYSDOT incorporates DBE goals as appropriate in its contracts for these projects, monitor compliance, and reports attainment and good faith efforts.

Freight and Passenger Rail Bureau

The Federal Rail Administration does not impose DBE participation requirements on its federally aided projects.

Office of Modal Grants Administration

The Office of Grants Administration monitors FTA funded contracts including ensuring contract language for DBE goals are in sub-recipients' bid specification documents. These entities also are responsible for monitoring and enforcing contractor compliance with the DBE program including ensuring that contractors attain their DBE goal commitments, DBEs perform a commercially useful function and payments are promptly made to all DBEs and subcontractors

Public Transportation Bureau

The Public Transportation Bureau monitors FTA funded contracts including ensuring contract language for DBE goals are in sub-recipients' bid specification documents.

For FTA funded projects the Office of Civil Rights meets annually with the Office of Modal Grants Administration and reviews projects awarded through the Public Transportation Bureau and assesses goals to those projects that present opportunities for DBE participation.

The Public Transportation Bureau, in collaboration with Office of Civil Rights, propose a triennial DBE goal for FTA-funded projects.

LEGAL AFFAIRS DIVISION

Contract Management Bureau

The Contract Management Bureau (CMB) administers the processing of contractual and financial documentation for all NYSDOT-administered capital construction contracts, architectural and engineering (A&E or professional services) contracts, and all non-architectural and engineering (non-A&E or non-professional services) contracts. CMB receives contract specific DBE goals from program areas and engages in goal assessment for requests for proposals. They consult with the Office of Civil Rights as

needed and serve as a key control point to ensure that goals are set and good faith efforts are documented.

The responsibility for monitoring compliance of DBE commitments for these types of contracts rests with the contract manager of the sponsoring group, whether they reside in the Main Office or the Region.

Purchasing Unit

Purchases of commodities and low-bid procurement of non-capital construction services is administered by NYSDOT's Purchasing Unit. The Purchasing Unit is responsible for the setting of contract DBE goals, evaluating bidder's good faith efforts, and assisting in monitoring compliance in cooperation with the sponsoring group on low bid USDOT-assisted procurement contracts.

D. Prompt Payment Mechanisms - Section 26.29

NYSDOT requires prime contractors to pay subcontractors for satisfactory performance on their contracts on a timely basis. As part of NYSDOT's contract requirements, "Standard Specifications, Section 109-07, *Prompt Payments by the Contractor*" is included in each USDOT-assisted prime construction contract:

109-07 PROMPT PAYMENTS BY CONTRACTOR. In accordance with Section 139-(f)(2) of the State Finance Law, the Contractor shall pay each Subcontractor and materialman for the value of work performed pursuant to contract no later than seven (7) calendar days from the receipt of each payment the Contractor receives from the State. Payment by the Contractor to Subcontractors or materialmen shall reflect the quantities or percentage of work completed by the Subcontractor or materials furnished by the materialmen, and paid by the State; and such payment shall be based upon the actual conditions of the subcontract or purchase order. The Contractor shall not hold any retainage, but may deduct an amount necessary to satisfy any claims, liens or judgments against a Subcontractor or materialman which have not been fully discharged.

The Contractor shall maintain an accounting system acceptable to the Department to track payments made by the State to the Contractor and payments made by the Contractor to each Subcontractor, Manufacturer, Fabricator or Material Supplier by item and by date. The Contractor shall enter payment data into the current Department approved civil rights reporting system in accordance with Section 105-21, *Civil Rights Monitoring and Reporting*, with any exceptions noted and explained.

CAM 109-07 provides guidance to NYSDOT personnel on how to monitor and enforce the prompt payment provisions.

State contract managers and sub-recipients monitor timeliness of payments to ensure that DBEs are paid timely.

Consultant agreements also include provisions requiring prompt payment of subconsultants. Article 8, *Partial Payments*, of the NYSDOT standard consultant contract agreement states the following:

All Subcontractor and Subconsultant vouchers received by the CONSULTANT at least ten (10) calendar days prior to a scheduled billing, shall be included in that billing, even if the CONSULTANT does not have other costs to be billed for that period. The CONSULTANT shall inform the Subcontractor or Subconsultant of the date the voucher was submitted to the STATE and the amount included for the Subcontractor or Subconsultant.

The CONSULTANT will not include any provisions in their subcontracts that would circumvent the intent of 49 CFR 26.29 to require the CONSULTANT to make partial payments to all Subcontractors and Subconsultants within seven (7) calendar days of receipt of payment from the STATE.

In accordance with 49 CFR 26.29, and NY State Finance Law 139-f or NY General Municipal Law 106-b(2) as applicable, sub-recipients are required to comply with the following prompt payment provisions included in *Appendix B – Requirements for Federally Aided Transportation Projects* NYSDOT must require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 7 calendar days from receipt of each payment made to the prime contractor.

NYSDOT does not hold retainage from prime contractors and prohibits prime contractors from holding retainage from subcontractors.

A subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed. In addition:

(1) Prime contractors must include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Contractors are instructed at pre-construction meetings that compliance staff will conduct audits of prompt payments to subcontractors by asking subcontracts if they are being paid on time, and by checking contract monitoring software to ensure sub contract payments have been made timely.

(4) Failure by Contractors to carry out these requirements is a material breach of this contract, which may result in remedies as the

Department deems appropriate, which may include, but is not limited to: (1) withholding contract payments; (2) assessing sanctions; (3) liquidated damages; (4) and/or disqualifying the Contractor from future bidding as non-responsible.

E.DBE Directory - Section 26.31

Under the New York State Unified Certification Program (NYSUCP), a directory is maintained that identifies all firms that have been certified as eligible to participate as DBEs in New York State. The NYSUCP DBE directory can be found online at this site: <https://nysucp.newnycontracts.com/>. The directory includes the following publicly available information for each firm: name, address, and telephone number; contact person; types of work the firm is certified to perform with appropriate six - digit North American Industry Classification System (NAICS) codes and descriptions. The directory contains additional information including but not limited to: geographic location of the firm, website address of the firm, email address of the firm and/or contact person.

F. Over-concentration - Section 26.33

If NYSDOT becomes aware of substantiated allegations or other strong evidence that supports the premise that DBE firms are so over-concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in that type of work, NYSDOT will conduct an investigation. Upon such investigation the Department will make a determination as to whether or not oversaturation exists under applicable regulations, statutes and case law.

If the NYSDOT determines that oversaturation exists within an area, it will pursue appropriate measures in accordance with applicable regulations, statutes and case law, in order to seek to address oversaturation issues. Under 49 C.F.R. 26.33 such measures may include the following:

- 1) Use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which NYSDOT has determined that non-DBEs are unduly burdened.
- 2) Possible adjustment of contract goals, to the extent consistent with 49 C.F.R. 26.51, in order to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

Prior to making any changes or adjustments to its DBE program to address oversaturation, the Department must gain approval from the U.S. Department of Transportation.

G. Business Development Programs - Section 26.35

The New York State Department of Transportation is committed to developing a Business Development Program (BDP) that offers programs and services to promote increased participation of Disadvantaged Business Enterprises (DBEs) in NYSDOT contracting opportunities for both construction and professional service firms.

NYSDOT's BDP provides a comprehensive support system to aid with the holistic development of under-utilized firms. The BDP will offer continuous training and education beginning from the time a firm is newly certified until it transitions out of the DBE program. The support structure is intended to facilitate increased opportunities, self - sufficiency, and long-term success.

NYSDOT's current BDP focuses on providing orientation for newly certified and under-utilized DBEs, assessing the business management knowledge of certified DBEs, implementing a Small Business Development initiative that promotes firm to firm training opportunities, region specific and work classification.

H. Monitoring and Enforcement Mechanisms – Section 26.37

NYSDOT's Office of Civil Rights has overall programmatic responsibility for monitoring and obtaining assurance that all Civil Rights related requirements are met, including DBE program regulations. Individual program areas are responsible for project-level and transaction-based monitoring.

If a NYSDOT construction contractor fails to exert good faith efforts to meet the DBE contract goal, or otherwise fails to comply with DBE program requirements, NYSDOT may suspend contract payments in accordance with Article 8, *No Payment on Contractor's Non-Compliance* of the contract agreement. The contractor may also be directed to attend a hearing before NYSDOT's Contract Review Unit; or NYSDOT may follow any other lawful procedure including cancellation, termination, or suspension in whole or in part in accordance with Article 11, *Right to Suspend Work and Cancel Contract*, of the contract agreement.

Where the Department determines that the Contractor is not in compliance with the requirements of the contract and the Contractor refuses to comply with such requirements, or if the Contractor is found to have willfully and intentionally failed to comply with the DBE participation goal, the Contractor will be obligated to pay to the Department Liquidated Damages.

NYSDOT implemented a system of monitoring and enforcement after contracts are awarded to ensure that work committed to DBEs is actually performed by the DBEs. This system includes Engineers-in-Charge, inspectors and Regional Compliance Specialists coordinating monthly reviews and activities to monitor and track contractor attainment of their DBE goal commitments.

This post-award monitoring system also includes NYSDOT's automated civil rights reporting system; which collects DBE goal, commitment and payment data from prime contractors and DBE sub-contractors and enables compilation, monitoring and reporting by the program areas and the Office of Civil Rights. Consultant project managers are also able to monitor and enforce compliance through this system. This mechanism provides for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. In reports of DBE participation to USDOT, both commitments and attainments are shown, as required by the USDOT reporting form.

For FTA funded projects the Office of Civil Rights meets annually with the Office of Modal Grants Administration and reviews projects awarded through the Public Transportation Bureau and assesses goals to those projects that present opportunities for DBE participation.

FTA funded projects are also monitored post-award through NYSDOT's automated reporting system.

NYSDOT will bring to the attention of USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take appropriate action as provided in 49 CFR Part 26.107. NYSDOT will consider similar action under New York State's own legal authorities, including referral to the New York State Office of Inspector General in accordance with Executive Law, Article 4-A.

Sub-recipients

All sub-recipients that administer contracts with USDOT financial assistance are required to fully conform to the DBE program requirements of NYSDOT's DBE Program.

Sub-recipients that receive FHWA funding for capital construction improvement contracts shall coordinate all DBE-related activities, questions and complaints with their appropriate NYSDOT Regional Local Project Liaison (RLPL) or Main Office Program Manager. Any questions or complaints requiring additional technical assistance can be forwarded to the NYSDOT's Main Office Local Programs Bureau and the Office of Civil Rights.

Sub-recipients that receive FTA funding shall coordinate all DBE-related activities, questions and complaints with their appropriate NYSDOT Policy and Planning Division liaison. Any questions or complaints requiring additional technical assistance can be forwarded to the Office of Civil Rights.

The State-Local Agreement is the mechanism by which NYSDOT formally commits specific funding to a locally-administered federal-aid transportation project and provides the basis for encumbering funds to be used to make payments on the project. Each of these financial-assistance agreements include required assurances. Each USDOT-assisted contract that sub-recipients sign with a contractor (and each subcontract the prime contractor signs with a sub-contractor) includes similar assurances.

Sub-recipients are required to oversee compliance with DBE program requirements by contractors who perform work on USDOT-assisted contracts. This oversight includes providing assurance the DBEs perform a commercially useful function.

NYSDOT is responsible for ensuring that sub-recipients comply with DBE program requirements. NYSDOT will monitor sub-recipients' performance and DBE program compliance.

I.Fostering Small Business Participation – Section 26.39

NYSDOT developed a Small Business Development Initiative as an element of the DBE Program. The Initiative is designed to increase competition, provide more opportunities for small businesses, and increase the support to meet NYSDOT's contracting needs. Key aspects of this initiative are to reserve certain contracts for small consultant engineering firms which include both DBE and non-DBE firms. NYSDOT's Small Business Development Program approved by FHWA is found in <P:\Audit and Civil Rights\Civil Rights\Small Business Development Program-November 2016.docx>.

NYSDOT's Office of Civil Rights is working with agency Engineering and Contract officials to avoid unnecessary or unjustified bundling of contracts. The Small Business Reauthorization Act of 1997 defines contract bundling as consolidating two or more procurement requirements for goods or services previously provided or performed under separate, smaller contracts into a solicitation of offers for a single contract that is unlikely to be suitable for award to a small business concern.

III. GOALS, GOOD FAITH EFFORTS and COUNTING 49 CFR Part 26: SUBPART C

A. Overall Goals - Section 26.45

NYSDOT submits overall goals to the USDOT operating administrations on a triennial basis. These goal plans included a summary of information and comments received during a public participation process and our responses. NYSDOT will continue our triennial submission and begin using our overall goal at the start of each Federal fiscal year (October 1) unless we have received other instructions from USDOT.

NYSDOT establishes overall DBE program goals in accordance with the process specified in 49 CFR Part 26.45 as follows:

- For use of FHWA funds, the goal is expressed as a percentage of all Federal-aid highway funds expended on FHWA-assisted contracts in the three forthcoming fiscal years.
- For use of FTA or FAA funds, the goal shall be expressed as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that will be expended in FTA- or FAA-assisted contracts in the forthcoming three fiscal years.
- NYSDOT's overall goal for each operating administration is evaluated on a Triennial basis and is based on demonstrable evidence of ready, willing and able DBEs available to participate on USDOT assisted contracts. The goals also take into consideration the type of work NYSDOT performs as described by the North American Industry Classification System,

In establishing an overall DBE goal, NYSDOT will provide for public participation. Information obtained from minority, women's and general contractor groups; community based organizations; and other officials or organizations concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and NYSDOT's efforts to establish a level playing field for the participation of DBEs will be considered in developing the goal.

NYSDOT will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at NYSDOT's Office of Civil Rights for 30 days following the date of the notice, and informing the public that the Office of Civil Rights will accept comments on the goal for 45 days from the date of the notice. This notice will be issued in general circulation media, available minority- focused media and trade publications and on NYSDOT's website. The notice will include the address of NYSDOT's Office of Civil Rights to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed.

If awards and commitments shown on the *Uniform Report of DBE Commitments/Awards and Payments* at the end of any Federal fiscal year are less than

the overall applicable DBE program goal, NYSDOT will prepare a short-fall analysis and develop corrective actions to help meet the goal during the following fiscal year.

B. Goal Setting and Accountability - Section 26.47

The Office of Design (Design) in coordination with the Office of Civil Rights, and the Office of Construction assess contract-level DBE goals on NYSDOT-let capital construction contracts. The goal assessment process begins in the Office of Design and is described in detail in Chapter 21 of the Highway Design Manual.

<https://www.dot.ny.gov/divisions/engineering/design/dqab/hdm/chapter-21>

The goal assessment memo is designed to ensure that project level goal evaluation is a collaborative process that includes factors related to location, project scope and actual availability of DBEs certified to complete project specific work items.

C. Transit Vehicle Manufacturers Goals - Section 26.49

NYSDOT requires each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Vehicle procurements conducted by sub-recipients must evidence verification that a transit vehicle manufacturer certification was submitted. A DBE goal is not assessed on the purchase of Transit vehicles. This certification is included in the [*Federal Clauses and Certifications for Federal Transit Administration \(FTA\) Funded Procurements*](#).

D. Meeting Overall Goals/Contract Goals - Section 26.51 –

NYSDOT intends to meet its overall DBE program goal to the maximum extent feasible through race-neutral means of facilitating DBE participation. Where race-neutral measures are inadequate to meet any portion of the overall goal, NYSDOT sets specific race-conscious contract goals for particular projects with subcontracting opportunities.

NYSDOT uses contract goals to meet any portion of the overall program goal that cannot be met using race-neutral means.

The Office of Design (Design) in coordination with the Office of Civil Rights, and the Office of Construction assess contract-level DBE goals on NYSDOT-let capital construction contracts. The goal assessment process begins in the Office of Design and is described in Chapter 21 of the Highway Design Manual.

<https://www.dot.ny.gov/divisions/engineering/design/dqab/hdm/chapter-21>

Contract goals will only be used on those USDOT-assisted contracts that have subcontracting possibilities including capital construction, engineering services, other services and locally administered federal aid transportation contracts. Contract goals will not be established on every contract.

NYSDOT will express contract goals as a percentage of total contract value.

Race-conscious goal setting policy will include measures to ensure DBE availability such as:

- Establishing a supportive services program to assist start-up firms, particularly in areas in which DBE participation has historically been low;
- Providing technical and business management assistance to DBEs through a supportive services program;
- Assisting DBEs and other small businesses in utilizing emerging technology (e.g BidExpress); and.
- Communicating information regarding contracting procedures and specific contract opportunities.

NYSDOT will also establishing an internal procedure for determining DBE availability on a per project basis.

Goals will not be assessed for the following contract types:

- Transit operating or construction contracts under fifty-thousand dollars.
- Contracts entered into under the Recreational Trails Program.
- Contracts entered into for Architectural and Engineering Services.

E. Good Faith Efforts – 26.53

Award of Contracts with a DBE Contract Goal: 26.53(a)

In those instances where a contract-specific DBE goal is included in a procurement/solicitation, NYSDOT will not award a contract to a bidder who does not either: (1) meet the contract goal with verified, countable DBE commitments; or (2) document the bidder's good faith efforts that were actually taken were adequate to meet the DBE contract goal, even though it was unable to do so. It is the obligation of the bidder to demonstrate it has made sufficient good faith efforts. Examples of the information to consider in evaluating good faith efforts are found in Appendix A to 49 CFR Part 26.

Demonstration of Good Faith Efforts: 26.53(a) and (c)

A bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts.

This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

NYSDOT is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts in order to be recommended for contract award.

The Office of Construction's Pre-Award Unit reviews all good faith efforts submitted for NYSDOT-let construction contracts. When the goal has not been met the Pre-Award Review Committee which consists of program areas representing the Engineering Division, the Planning Division, the Office of Civil Rights and the Legal Division, review the GFE efforts in the bid packet to determine if the efforts are sufficient.

For locally-administered federal-aid transportation contracts, the Project Sponsor/sub-recipient, the Regional Local Project Liaison, or the program area administering the contract, and the Office of Civil Rights review the adequacy of good faith efforts.

The Contract Management Bureau reviews all good faith efforts for NYSDOT administered professional services contracts.

The Procurement Unit reviews good faith efforts made in connection with commodity contracts. The Office of Civil Rights may provide a programmatic level of review of good faith efforts made in connection with any contract, as appropriate.

For Design Build projects the Design-Builder is required to submit its DBE commitments with its Proposal. The commitments are evaluated during the procurement process. Once portions of final design have been completed, or, in the case of the Contract Document sample, after 30 days, the Design-Builder submit lists of DBEs. This list will be updated as the Project progresses and as there are changes or additions to the DBE list.

Information to be submitted: 26.53(b)

NYSDOT treats bidder/offers' compliance with good faith efforts' requirements as a matter of responsiveness.

Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information within five (5) calendar days of being notified that they are the successful bidders.

- The names and addresses of DBE firms that will participate in the contract;
- Work category for each proposed DBE (Construction, Material Supply, Fabrication, etc.)
- A detailed description of the contract pay items that each DBE will perform;
- The dollar amount of the participation of each DBE firm participating;

- Documentation of commitment to use a DBE whose participation it submits to meet a contract goal;
- Confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
- If the contract goal is not met, sufficient documentary evidence of good faith efforts.

Administrative reconsideration: 26.53(d)

Within five (5) business days of being informed by NYSDOT that it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. For engineering related procurements, bidders/offerors may make this request in writing to Assistant Commissioner for the Engineering Division and Chief Engineer. For all other procurements, this request may be made to the Assistant Commissioner for the Administrative Services Division.

The decision on reconsideration will be made by a NYSDOT official who did not take part in the original determination that the bidder/offeror did not make adequate good faith efforts to meet the goal.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation, legal authority and other support for its position concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. NYSDOT will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to USDOT.

Design-Build contracts: 26.53(e)

NYSDOT may establish a DBE goal for its Design-Build contracts. The goals for the Project should be a combination of a consultant goal for the design portion, and a construction goal for the construction portion. The Office of Civil Rights (OCR) must be consulted early in the process to create the goals.

A bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

The selected design-builder must continue to make good faith efforts to achieve the contract goal over the life of the project. At the time of proposal, NYSDOT requires

proposing firms to submit documentation of actual commitments made to DBE subcontractors and specific project plans to utilize DBEs throughout the life of the contract. The selected design-builder may further establish DBE contract goals, as appropriate, for subcontracts it awards.

Good Faith Efforts when a DBE is replaced on a contract: 26.53(f)

NYSDOT requires that prime contractors cannot terminate a DBE subcontractor without NYSDOT's prior written approval. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm or another DBE firm; and partial terminations in which the prime contractor seeks to reduce the work committed to a DBE firm at the time of contract award.

Prior written consent will only be provided where there is good cause for termination of the DBE firm. Good cause includes, but is not limited to, the following circumstances in which the listed DBE sub-contractor:

- fails or refuses to execute a written contract;
- fails or refuses to perform the work of its subcontract in a way consistent with industry standards;
- fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;
- becomes bankrupt or insolvent;
- is ineligible to work on public works projects because of suspension and debarment proceedings;
- has been determined to not be a responsible contractor;
- voluntarily withdraws from the project and provides written notice to NYSDOT of its withdrawal;
- is ineligible to receive DBE credit for the type of work required; and
- is unable to complete its work on the contract due to the death of the owner.

Before transmitting to NYSDOT its request to terminate, the prime contractor must give notice in writing to the DBE of its intent to do so. The prime contractor must submit a written request to the Engineer In Charge (EIC) of the contract. The EIC will then provide a copy of the written request to terminate the DBE to the Regional Compliance Specialist for termination request review and concurrence. A copy of this notice must be provided to NYSDOT prior to consideration of the request to terminate. Where there is no concurrence to terminate the DBE the written request shall be submitted to the Office of Civil Right for a final review and determination. The DBE will then have five (5) days to respond and advise NYSDOT of why it objects to the proposed termination.

In those instances where good cause exists to terminate a DBE's contract, NYSDOT requires the prime contractor to make good faith efforts to replace the DBE that is being terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. The prime contractor

must notify NYSDOT immediately of a DBE's inability or unwillingness to perform and provide supporting documentation. In this situation, NYSDOT requires the prime contractor to obtain prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

NYSDOT's process for revising DBE utilization commitments and how to collect information necessary to determine whether the bidder/offeror has satisfied these requirements is detailed in Section 105-21 of NYSDOT's Standard Specifications.

F. Counting DBE Participation - Section 26.55

NYSDOT counts DBE participation toward overall and contract goals on State and locally administered federal aid transportation projects as provided in 49 CFR Part 26.

NYSDOT's *Standard Specifications* and *Local Project Manual* provide how DBE participation on USDOT-assisted contracts should be counted towards goal attainment. This includes participation on contracts let by sub-recipients such as the New York State Thruway Authority, New York City Department of Transportation and other municipalities and authorities as well as DBE participation attained by transit and MPO sub-recipients.

Expenditures to DBE contractors will be counted toward DBE goals only if the DBEs are performing commercially useful functions. NYSDOT requires that a Commercially Useful Function (CUF) determination be performed for every DBE subcontract.

For contractors working on the actual project sites the CUF review process and requirements are outlined in Section 105.21 of the Standard Specification. For material suppliers not located on the project site NYSDOT uses consultant services to conduct CUF reviews and advise NYSDOT OCR of the findings.

Trucking Operations. A DBE trucking firm shall own and operate at least one registered, insured, and fully operational truck used on the contract and shall be responsible for the management and supervision of the trucking operation for which it is responsible, and the arrangement cannot be contrived solely for the purpose of meeting the DBE goal(s).

Pursuant to 49 CFR Part 26.55 NYSDOT has selected the crediting option for DBE trucking firms that allows one hundred percent of the value of the trucking operations the DBE provides on the contract using trucks it owns or leases on a long-term basis that are registered, insured, and operated by the DBE using drivers it employs, to be counted toward the DBE goal(s).

The DBE may obtain trucks from another DBE, including an owner/operator. One hundred percent of the value of the trucking operations that the other DBE provides will also be counted toward the DBE goal(s).

The DBE may obtain trucks from a non-DBE, including an owner-operator. Only the value of the fee or commission that the DBE receives as a result of the arrangement with the non-DBE will be counted toward the DBE goal(s).

IV. CERTIFICATION STANDARDS 49 CFR Part 26: SUBPART D

- Section 26.61 - Burdens of Proof**
- Section 26.63 - Group Membership**
- Section 26.65 - Business Size**
- Section 26.67 - Social and Economic Disadvantage**
- Section 26.69 - Ownership**
- Section 26.71 - Control**
- Section 26.73 - Other Rules Affecting Certification**

NYSDOT uses the certification standards of Subpart D of 49 CFR Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. NYSDOT makes certification decisions based on the facts as a whole.

For information about NYSDOT's certification process or to apply for certification, firms should contact:

Disadvantaged Business Certification Unit
New York State Department of Transportation
50 Wolf Road
Albany, New York 12232
(518) 457-9679

Information regarding how a firm can be certified as a DBE, certification application forms and documentation requirements are found on NYSDOT's DBE Certification Program webpage: <https://www.dot.ny.gov/main/business-center/civil-rights/general-info/dbe-certification>.

V. CERTIFICATION PROCEDURES 49 CFR Part 26: SUBPART E

A. Unified Certification Program - Section 26.81

NYSDOT is a member of the New York State Unified Certification Program (NYSUCP) established in accordance with 49 CFR Part 26. The certifying partners of the NYSUCP include NYSDOT, the Metropolitan Transportation Authority, Niagara Frontier Transportation Authority, and the Port Authority of New York and New Jersey.

NYSDOT will use and count for DBE credit only those DBE firms certified by the NYSUCP in accordance with their NYSUCP DBE Directory listing, unless a variance from this certification process and DBE program is authorized and approved by FHWA.

The signed agreement page of the Memorandum of Understanding for the NYSUCP is found in this document. <https://www.dot.ny.gov/main/business-center/audit/repository/UCPMOU-Original>

The current MOU has provisions for a rotating chairperson to be determined annually. The UCP collectively proposes changes to the MOU that are incorporated into the document.

B. Procedures for Certification Decisions - Section 26.83

NYSDOT follows the certification processes of Subpart E of 49 CFR Part 26 to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts. Once certified, a DBE shall remain certified until and unless its certification has been removed.

All DBE owners must submit every year, on the anniversary date of their certification, an affidavit meeting the requirements of 49 CFR Part 26.83 that affirms there have been no changes in the circumstances regarding the firm affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26. Firms are required to submit with this affidavit documentation of the firm's size and gross receipts.

If there any changes in circumstances affecting the ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Part 26 or of any material changes in the information provided with certification applications, these DBE firms must notify NYSDOT of these changes within 30 days in the form of an affidavit meeting the requirements of 49 CFR Part 26.83.

NYSDOT notifies all currently certified DBE firms of these obligations annually by letter sent 45 days in advance of the due date. This notification informs DBEs that to submit the "no change" affidavit, their owners must swear or affirm that they meet all regulatory requirements of 49 CFR Part 26, including personal net worth. Likewise, if a firm's owner knows or should know that he or she, or the firm, fails to meet a 49 CFR Part 26 eligibility requirement (e.g. personal net worth), the obligation to submit a notice of change applies.

All disadvantaged owners of applicant firms and currently certified DBE firms whose eligibility under Part 26 is reviewed are required to submit a Statement of Personal Net Worth (based on *SBA Form 413*) which collects personal net worth information and sets forth the documentation respondents must submit with it.

C. Interstate Certification - Section 26.85

The NYSUCP may choose to accept another state's certification and certify a DBE without further procedures upon confirmation that the firm has a current valid certification from the other state.

The NYSUCP will make an entry in the USDOT Office of Civil Rights Ineligibility Determination Online Database whenever it denies a firm's DBE application, rejects the application of a firm already certified by another state, or decertifies a firm.

D. Denials of Initial Requests for Certification - Section 26.86

If a firm's application is denied, the firm must wait at least until 12 months have passed from this action before it may reapply for DBE certification with the NYSUCP. This time period begins on the date that the explanation for denial of certification is received by the applicant firm.

E. Removal of a DBE Firm's Eligibility - Section 26.87

In the event NYSDOT proposes to remove a DBE's certification, the NYSUCP follows procedures consistent with 49 CFR Part 26.87.

To ensure an appropriate separation of functions, representatives of NYSUCP's certifying partners will collectively serve as the decision-maker in all decertification proceedings. The certifying partner responsible for the initial removal of DBE certification will not participate in the final determination. This separation ensures that the decision in the proceeding is made independently from the office and personnel that took part in actions leading to the proposal to remove a firm's DBE eligibility. The decision-making partners have not participated in any way in the decertification proceeding against the firm (including the decision to initiate such a proceeding).

F. Certification Appeals - Section 26.89

Any firm or complainant may appeal a NYSUCP decision in a certification matter to USDOT. The appeal must be filed within 90 days from the date of the decision to deny certification or to remove certification. Such appeals may be sent to:

U. S. Department of Transportation
Office of Civil Rights
1200 New Jersey Avenue, S.E.
Washington, D. C. 20590

G. Actions Following USDOT Appeal Decisions - Section 26.91

NYSDOT will promptly implement any USDOT certification appeal decisions affecting the eligibility of DBEs for our USDOT-assisted contracting (e.g., certify a firm if USDOT has determined that our denial of its application was erroneous).

VI. COMPLIANCE AND ENFORCEMENT

49 CFR Part 26: SUBPART F

A. Compliance Procedures - Section 26.101

In accordance with 49 CFR Part 26, NYSDOT and/or any sub-recipients may be subject to compliance actions or sanctions for failing to carry out any requirement of this part.

B. Enforcement Actions in FHWA and FTA Programs - Section 26.103

FHWA and FTA may review NYSDOT's and/or any sub-recipient's compliance with the requirements of 49 CFR Part 26 at any time. Any person who believes that NYSDOT has failed to comply with its obligations under this part may file a written complaint to FHWA's or FTA's Office of Civil Rights. Such a complaint must be filed within 180 days after the date of the alleged violation.

C. Enforcement Actions in FAA Programs - Section 26.105

Compliance with all requirements of this part by airport sponsors and recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code. FAA may review compliance with 49 CFR Part 26 at any time, as appropriate. Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint with the FAA Office of Chief Counsel. NYSDOT is a direct recipient for federal funds for Republic Airport located in East Farmingdale, New York. NYSDOT does not provide FAA funds to sub-recipients.

D. Enforcement Actions Applicable to Participating Firms - Section 26.107 –

USDOT may initiate suspension or debarment proceedings against any firm that does not meet the DBE eligibility criteria and that attempts to participate in a USDOT-assisted program as a DBE on the basis of false, fraudulent or deceitful statements or representations. Similarly, USDOT may initiate suspension or debarment proceedings against any firm that in order to meet DBE contract goals or other DBE program requirements, use or attempts to use another firm that does not meet the DBE eligibility criteria on the basis of false, fraudulent or deceitful statements or representations. USDOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action.

E. Information, Confidentiality, Cooperation - Section 26.109 -

NYSDOT safeguards from disclosure to third parties information that may reasonably be regarded as confidential private personal or business information, consistent with Federal, State, and local law.

Notwithstanding any contrary provisions of State or local law, NYSDOT will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than USDOT) without the written consent of the submitter.

Attachment 1

ORGANIZATIONAL CHARTS



2019
Organizational Char

Attachment 2

DBE Policy Statement

https://www.dot.ny.gov/main/business-center/civil-rights2/civil-rights-repository/Tab/DBE%20Policy_0.pdf

Attachment 3
NYS Unified Certification Program Memorandum of Understanding

Attachment 4

NYS Unified Certification Program Standard Operating Procedures

